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Is There Anything To Fear in Transnationalist Development of Law? The Australian Experience

Paul von Nessen*

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I. INTRODUCTION

The recent decisions by the United States Supreme Court concerning the Guantanamo Bay detainees¹ and the application of capital punishment to minors² have instigated renewed debate about the appropriateness of using international law or transnational legal developments as guidance in

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1. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

2. Roper v. Simmons, 543 U.S. 551 (2005).

determining domestic United States law.³ Various Justices of the United States Supreme Court have in recent years indicated that they are not completely receptive to the use of international material in determining domestic law;⁴ however, a consideration of cases from the British Commonwealth concerning the extent of the territorial application of the writ of habeas corpus as assistance in determining whether the writ should apply to non-United States citizens detained in Guantanamo Bay⁵ and reference to international opinion relating to the imposition of capital punishment on juveniles⁶ may indicate that transnationalism is having a growing influence in United States jurisprudence.⁷

It is ironic that the United States, historically viewed as the most innovative of the common law countries, is perceived as one of the least receptive to growing international judicial discourse: its practice has been described as exhibiting “a distinct lack of institutional enthusiasm” in this regard.⁸ By contrast, the Canadian Supreme Court and the High Court of Australia are regarded, at least by academic writers, as being quite receptive to consideration of international legal material.⁹ The practices of the High

3. See, e.g., Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109 (2004); Harold Hongju Koh, *The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004).

4. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (stating that “such comparative analysis [is] inappropriate to the task of interpreting a constitution”); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) (expressing similar views).

5. In *Rasul v. Bush*, 542 U.S. 466 (2004), Justice Scalia referred to cases from the British Commonwealth concerning the extent of the territorial application of the writ of habeas corpus. *Id.* at 555-58 (Scalia, J., dissenting); see also John R. Crook, *General International and U.S. Foreign Relations Law: United States Lifts Some Sanctions on Libya*, 99 AM. J. INT'L L. 253, 261 (2005).

6. In *Roper v. Simmons*, 125 S. Ct. 1183 (2005), international opinion relating to the imposition of capital punishment on juveniles was referred to by the majority opinion of Justice Kennedy, in which Justices Stevens, Souter, Ginsberg and Breyer joined. *Id.* at 1199.

7. See generally Koh, *supra* note 3. Koh suggests a tension between the nationalists and transnationalists on the Supreme Court:

On the current U.S. Supreme Court, I would argue, there are now four Justices who are direct heirs to the transnationalist tradition: Stephen G. Breyer, Ruth Bader Ginsburg, John Paul Stevens, and Justice David Souter. At the same time, there are three Justices who are firmly nationalist in their orientation: Antonin Scalia, Clarence Thomas, and Chief Justice William Rehnquist. Justices Sandra Day O'Connor and Anthony Kennedy represent the swing votes. And if 2004 proved to be a pivotal year, it was because the swing voters, Justices O'Connor and Kennedy, cast their lot with the transnationalist faction of the Supreme Court, thereby bringing the Court into the modern international era.

Id. at 6; see also Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23 (2004).

8. See Sarah Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 439 (2003).

9. See Rebecca Lefler, Note, *A Comparison of Comparisons: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165 (2001); Jens C. Dammann, *The Role of*

Court of Australia and the Supreme Court of Canada, in contrast to that of the United States Supreme Court, have been cited as examples of how using foreign case authority can help to develop national jurisprudence.¹⁰ This Article considers whether the perceptions of an increasing transnational attitude by the High Court of Australia can be established by empirical evidence. It then addresses the perceived benefits of this approach for Australia.

In order to determine whether a transnationalist attitude on the High Court of Australia could be substantiated by empirical evidence, this Article revisits a citation analysis of the High Court of Australia's use of United States authority undertaken by the author in 1987. That study, published in 1992 in the *Adelaide Law Review*,¹¹ attempted to document the influence of United States jurisprudence upon legal developments in Australia as a result of unique historical factors, primarily the use of the United States Constitution as a precedent for Australia's federal system. The study observed a number of trends attributable to these historical factors (restated below), but it also identified an emerging trend which was then attributed to a new willingness of the Australian High Court to consider broader sources of judicial reasoning. The review, modification and updating the original study undertaken in this article attempts to confirm that emerging trend observed in the original study by considering an additional sixteen years of evidence.

Citation analysis, as employed herein, has been used in a number of contexts to provide objective evidence; often to demonstrate, support or explain conclusions or valuations which themselves may be quite subjective. For example, the statistical analysis of voting patterns within particular courts has been used to explore issues such as the political biases and judicial attitudes of the justices who sit on that court.¹² Similarly, citation

Comparative Law in Statutory and Constitutional Interpretation, 14 ST. THOMAS L. REV. 513 (2002).

10. See *Printz v. United States*, 521 U.S. 898, 921 (1997); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari); see also *Harding*, *supra* note 8, at 410 n.4, 417; David S. Clark, *The Use of Comparative Law by American Courts*, 42 AM. J. COMP. L. 23 (1994); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

11. Paul E von Nessen, *The Use of American Precedents by the High Court of Australia, 1901-1987*, 14 ADEL. L. REV. 181 (1992). The original study was updated to October 2002. The description of the methodology, the control samples from 1987 (reproduced *infra* note 54 and Part IV), and certain of the initial conclusions reported in this paper are derivative from that article, and are reproduced here with permission.

12. See, e.g., GLENDON SCHUBERT, *THE JUDICIAL MIND: ATTITUDES AND IDEOLOGIES OF THE SUPREME COURT JUSTICES 1946-1963* (1965); GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY* (1974); Jerry K. Beatty,

analysis has been used to assess the influence of particular justices,¹³ of law reviews and other academic writings,¹⁴ and of particular law review articles.¹⁵ Citation analysis has also been used to reveal whether there is a

Decision-Making on the Iowa Supreme Court —1965-1969, 19 DRAKE L. REV. 342 (1970); Joseph A. Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals*, 8 KAN. J.L. & PUB. POL'Y 126 (1999); Daryl Fair, *An Experimental Application of Scalogram Analysis to State Supreme Court Decisions*, 1967 WIS. L. REV. 449 (1967); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); James Leonard, *Ideology and Judicial Behavior: A Statistical Study of the Ohio Supreme Court: 1970, 1975, 1980 and 1985 Terms*, 57 U. CIN. L. REV. 935 (1989); William H. Manz, *The Citation Practices of the New York Court of Appeals 1850-1993*, 43 BUFF. L. REV. 121 (1995); William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273 (2001); John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954) [hereinafter Merryman, *Authority of Authority*]; John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977) [hereinafter Merryman, *Theory of Citations*]; C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890 (1941); George Rose Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship*, 1 ARK. L. REV. 89 (1947); Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453 (1996); S. Sidney Ulmer, *Supreme Court Behavior and Civil Rights*, WEST. POL. Q., Jun. 1960, at 288-311; Patrick Brown & William A. Haddad, Comment, *Judicial Decision-Making on the Florida Supreme Court: An Introductory Behavioral Study*, 19 U. FLA. L. REV. 566 (1967); Eric Scott Richards, Comment, *The Supreme Court of Michigan During the Survey Period: A Statistical Analysis*, 32 WAYNE L. REV. 215 (1986).

13. See, e.g., Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J. LEGAL STUD. 223 (2001); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999); Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333 (1998); William M. Landes, Lawrence Lessig, & Michael E. Solimine, *Judicial Influence? A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998); Peter McCormick, *The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989-1993*, 33 OSGOODE HALL L.J. 453 (1995); Russell Smyth, *Who Gets Cited: An Empirical Study of Judicial Prestige in the High Court*, 21 U. QUEENSL. L.J. 7 (2000); Russell Smyth, *Judicial Prestige: A Citation Analysis of Federal Court Judges*, 6 DEAKIN L. REV. 120 (2001).

14. See, e.g., Vaughan Black & Nicholas Richter, *Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990*, 16 DALHOUSIE L.J. 377 (1993); John J. Hasko, *Persuasion in the Court: Non-Legal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427 (2002); Richard Kopf, *Do Judges Read the Review? A Citation-Counting Study of the Nebraska Law Review and the Nebraska Supreme Court, 1972-1996*, 76 NEB. L. REV. 708 (1997); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998); Patricia McMahon, *Canadian Judicial Citations of Articles Published in the University of Toronto Faculty of Law Review*, 59 U. TORONTO FAC. L. REV. 367 (2001); Ian Ramsay & G. P. Stapledon, *A Citation Analysis of Australian Law Journals*, 21 MELB. U. L. REV. 676 (1997); Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L. REV. 1009 (2000); Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Court of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986); Russell Smyth, *Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court*, 17 U. TAS. L. REV. 164 (1998); Russell Smyth, *The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Courts*, 9 GRIFF. L. REV. 25 (2000).

15. See, e.g., Deborah Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996); Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449 (1991); Fred R.

significant variation in the frequency of citations by a particular court over specified periods of time or in reference to specific areas of law.¹⁶

In addition to the extensive use of citation analysis to ascertain the influence of justices, academic writers, law review articles, or particular cases,¹⁷ the observation and analysis of the influential effect that one court has upon another has often been the subject of study. In federations such as the United States, Canada, or Australia, such studies have been used in order to identify which of the state or provincial courts have been cited more frequently by other state or provincial courts.¹⁸ Less common have been studies which attempt to establish the influential effect of the judicial opinions expressed by the courts of one nation upon the judicial attitudes reflected in the courts of another.¹⁹

The wide acceptance of empirical analysis for such a broad range of purposes, particularly since 1990, confirmed that updating the original study would make a positive contribution to the debate about increased global perspectives of the judiciary by providing evidence of changing patterns of the use of foreign authority by the High Court of Australia. It was anticipated that the review of the use of both federal and non-federal United States authority (as occurred in the original study) would provide evidence of an increased willingness of the High Court of Australia to consider

Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996).

16. See, e.g., Merryman, *Authority of Authority*, *supra* note 12; Merryman, *Theory of Citations*, *supra* note 12; Landes & Posner, *supra* note 12, at 251-52.

17. Robert Schriek, *Most-Cited U.S. Courts of Appeals Cases from 1932 Until the Late 1980s*, 83 LAW LIBR. J. 317 (1991).

18. The most notable American example of this is found in *State Supreme Courts: A Century of Style and Citation*, in which a project analyzing the citation practice of various American state courts included a study of the pattern of citations by these courts of the judgments of other states' courts. Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 799-808 (1981). Canadian studies include: Peter McCormick, *The Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citations of Judicial Authority*, 1922-92, 32 OSGOODE HALL L.J. 271 (1994); Peter McCormick & Tammy Praskach, *Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba*, 24 MAN. L.J. 335 (1996); Peter J. McCormick, *Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta*, 34 ALTA. L. REV. 870 (1996). Australian studies include: Russell Smyth, *What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts*, 21 ADEL. L. REV. 51 (1999); Russell Smyth, *What Do Judges Cite? An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria*, 25 MONASH U. L. REV. 29 (1999).

19. See, e.g., Uriel Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1955); J.M. MacIntyre, *The Use of American Cases in Canadian Courts*, 2 U. B. C. L. REV. 478 (1966); Peter McCormick, *The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview*, 8 S. CT. L. REV. 2d 527 (1997).

foreign authority, despite the fact that the study was limited principally to one (albeit a very large) sample of foreign authority.

II. AUSTRALIA'S HISTORICAL CONTEXT

In the common law systems of the world, the use of international solutions as guidance to determine appropriate domestic judge-made law is often difficult to reconcile with the theory and doctrine of precedent. The concepts of precedent attempt to ensure that the development or application of the common law proceeds in an efficient manner. For this reason, the value of judicial precedent depends on the pronouncing court's position in its judicial hierarchy.²⁰ Because foreign law and foreign judgments do not always come from within a particular judicial hierarchy, the application of such law (even by adopting the better reasoning within it) presents the continuing tension of the common law that is faced by any judge who accepts or prefers a judicial view that is unsupported by prior domestic authority.²¹

In the United States, the Supreme Court does not have general appellate jurisdiction over non-federal matters determined by the state court systems.²² In consequence of this, the courts of the various states in the United States have been able to review external common law developments (in other states as well as internationally) without any degree of compulsion.²³ The effect which this has on the development of both the common law and the judicial processes within each of the American states has been quite dramatic, clearly distinguishing the common law development in the United States from that in other common law countries.²⁴

20. See JULIUS STONE, *PRECEDENT AND LAW* 197-218 (1985).

21. *Id.* at 186-192; see also RONALD DWORKIN, *LAW'S EMPIRE* (1986) (raising the interplay between principles and rules).

22. See *Merrell-Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 814 (1986) (holding that where state law issues dominate, or there is no federal question present, federal courts generally do not have jurisdiction).

23. *Murdock v. City of Memphis*, 87 U.S. (20 Wall) 590 (1875). In this case, the U.S. Supreme Court reviewed the statutory pronouncement of its appellate powers contained in the Judiciary Act of 1789, § 25, 1 Stat 73, amended by Judiciary Act of 1867, § 2, 14 Stat 385. It concluded, in relation to matters arising under state law not involving a federal issue: "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under this local law, whether statutory or otherwise." *Murdock*, 87 U.S. at 626. See generally *Michigan v. Long*, 463 U.S. 1032 (1983); Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961).

24. See Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 455-56 (1975). This is also reflected in the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requiring federal courts to resolve common law problems by application of local (state) law, rather than general federal common law. See Edward C. Jones, *Federal Judiciary Act, Stare Decisis, Decisions of State Courts Other Than the Highest as Being Binding Precedents in Federal Courts*, 15 S. CAL. L. REV. 71 (1941) (reviewing this issue and discussing the problems this has caused to federal courts).

Through the potential development of alternative common law principles, the states of the United States have often presented alternative solutions to resolve common law issues as they have developed.²⁵

In addition to the experimental nature of the development of the common law within the United States, the judiciary of each U.S. state has had the opportunity to utilize standard techniques (the techniques of comparative law) when determining whether or not to adopt common law principles developed in other states. The comparative techniques used in the consideration of foreign law (*i.e.*, weighing the benefits and detriments of alternative solutions, considering whether there is an alignment of the policy objectives in relation to the alternative solutions, and considering possible differentiating factors between local circumstances and those of the state in which the solutions have been used) are applied implicitly but are not recognized as comparative law at all:

[A]ll Americans are comparativists to the extent that they consult out-of-state authorities. As is often the case when practical needs override scholarly interest (the rule of *stare decisis* being the most interesting example), no one takes time to study, understand or verbalize the activity of comparing. These activities (comparing American jurisdictions, following legal precedents and so on) become part of . . . the tacit knowledge, the obvious and routine activities that do not commend nor require explanation. Consequently, a preponderance of the scholarship published in this country [the United States] by comparative lawyers is methodologically unaware, simply applying the same exercise of comparing one U.S. jurisdiction to another to multinational jurisdictions.²⁶

25. See, e.g., Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565 (2001) (explaining the development of the concept of anticipatory breach in the United States); see also Gregory S. Crespi, *The Adequate Assurances Doctrine After U.C.C. § 2-609: A Test of the Efficiency of the Common Law*, 38 VILL. L. REV. 179 (1993); Dena DeNooyer, Comment, *Remedying Anticipatory Repudiation—Past, Present, and Future?*, 52 SMU L. REV. 1787 (1999). Similar descriptions of the adoption by various states of the principle of comparative negligence as an alternative to contributory negligence can be found in: Mary Davis, *The Scope of Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281 (1994); Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691 (1953); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); Michael Steenson, *Comparative Negligence in Minnesota*, 9 WM. MITCH. L. REV. 299 (1983).

26. MICHAEL POLANYI, *THE TACIT DIMENSION* (1967), Ugo Mattei, *An Opportunity Not to Be Missed: The Future of Comparative Law in the United States*, 46 AM. J. COMP. L. 709, 717 (1998)

In contrast to the legal circumstances of the United States, the judiciary in the British Commonwealth, including Australia and Canada, has historically been under both structural and cultural pressure to consider common law developments from other common law countries (other than the United States) as potentially applicable to them.²⁷ These pressures were caused by the presence of the Privy Council at the common apex of the judicial hierarchy of the British Commonwealth and by the acceptance that the common law should, as far as practical, remain "common" throughout the common law world (which in this context excluded the United States).²⁸

The importance of the Privy Council as a unifying factor in the British common law sphere was, until recently, unquestioned. While local variants of the common law (on the basis of peculiar local circumstances) existed, the case of *Bakhshuwen v. Bakhshuwen* indicated that a determination by the Privy Council of a point of common law would generally be binding authority upon all courts over which it was the ultimate appellate court.²⁹ For that reason, the common law throughout the British Empire was subject to a similar unifying influence, such as is exercised by the United States Supreme Court in relation to the various United States Circuit Courts of Appeals.

In addition to the constraint that the Privy Council represented as the ultimate court of appeal, there was also an acknowledgement throughout the British Commonwealth that common law development should ideally proceed in a similar fashion throughout the world. The Privy Council itself had stressed the importance of maintaining such uniformity in the nineteenth century case of *Trimble v Hill*: "[I]t is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."³⁰

(citing DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (*FIN DE SIECLE*) 78 (1997)); Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455 (1995)).

27. The use of foreign authority by common law courts (with particular reference to those of the British Commonwealth) has been considered in: T. Koopmans, *Comparative Law and the Courts*, 45 INT'L. & COMP. L.Q. 545 (1996); Thomas Allen & Bruce Anderson, *The Use of Comparative Law by Common Law Judges*, 23 ANGLO-AM. L. REV. 435 (1994); B.S. Markesinis, *Judge, Jurist and the Study and Use of Foreign Law*, 109 LAW Q. REV. 622 (1993); H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987).

28. While reference to United States authority by the Courts of other common law countries may be useful, the differences between United States law and legal culture and that of the remainder of the common law world have tended to inhibit the use of United States authority. Typical of the attitude to United States law generally is the oft-quoted cautionary view expressed by Sir Anthony Mason, former Chief Justice of the Australian High Court:

American case law is a trackless jungle in which only the most intrepid and discerning Australian lawyers should venture. It is possible to find American authority to support almost any conceivable proposition of law It is essential therefore to use American authority with care and discrimination.

Sir Anthony Mason, *The Use and Abuse of Precedent*, 4 AUSTL. BAR REV. 93, 108-109 (1988).

29. [1952] A.C. 1 (P.C. 1952) (appeal taken from Eastern Africa).

30. 5 App. Cas. 342, 345 (P.C. 1879).

Similar views were also expressed by the courts of other countries, with a prime example being the view expressed in *Waghorn v. Waghorn*.³¹ In this case, the High Court of Australia indicated its willingness not only to defer to the views of the Privy Council, but also to the views of other English Courts.³² The High Court in *Waghorn* decided to follow the views of the English Court of Appeal, in preference to its own prior decision, on a matter of statutory interpretation concerning a similar statute.³³ This was justified by reference to the desire for uniformity:

The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperiled. Statutes based upon a common policy and expressed in the same or similar forms ought not to be given different operations. In this court some trouble has been taken to preserve consistency of decision, not only with English courts, but also with those of Canada and New Zealand. English courts cannot be expected to receive the decisions of the Dominions with the traditional respect which the courts of the Dominions pay to the decisions of the English courts, but it is disappointing to find that, upon the particular question with which we are concerned, the Court of Appeal did not take an opportunity of considering the judgment delivered by this court³⁴

In *Piro v. W. Foster & Co. Ltd.*,³⁵ Chief Justice Latham, after reiterating the binding nature of Privy Council decisions on the High Court of Australia, confirmed the regard to be given to the English House of Lords by Australian courts inferior to the High Court:

In quest of uniformity I considered in *Waghorn v Waghorn* that we should yield to a decision of the English Court of Appeal rather than follow a decision of our own Court. Technically we are bound only by the judgments of the Privy Council, but I have no doubt that we should follow all rulings of the House of Lords on points of law common to both countries. I agree that, in the absence of any ruling of this Court, the learned Chief Justice of the Supreme Court of New South Wales . . . was right in considering that he was bound by

31. (1942) 65 C.L.R. 289.

32. *See id.* at 291.

33. *Id.*

34. (1942) 65 C.L.R. 289, 297-98.

35. (1943) 68 C.L.R. 313, 325-26.

a decision of the High Court as the ultimate court of appeal for Australia subject to an appeal to the Privy Council. But for the future, in order to prevent circuity of action, it is advisable for us to direct that Australian courts should follow all rulings of the House of Lords and of course the Privy Council in preference to those of this Court.³⁶

With the elimination of appeals from Canada (in 1949)³⁷ and Australia (in 1986)³⁸ to the Privy Council, the structural constraints in both countries have enabled greater recourse to developments in foreign jurisdictions as guidance to the proper evolution of Canadian and Australian law. The application of foreign law by judges of the common law systems outside the United States³⁹ is consequently perceived to be an increasing phenomenon, one worthy of observation and measurement.

III. DESCRIPTION OF THE EMPIRICAL STUDY METHODOLOGY

In order to measure empirically the acceptance of international judicial authority by the High Court of Australia, a sample of foreign opinions cited by the High Court of Australia had to be identified and quantified. Unmeasured anecdotal observations indicated that United States judicial authority was used commonly enough by the High Court of Australia to provide a sample of sufficient size to make an analysis likely to reveal both

36. *Id.*

37. See The Supreme Court Act, R.S., 1952, c. 259, section 54(1)-(2), An Act respecting the Supreme Court of Canada (stating that “[t]he Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.”). Footnote 1 of this Act explains that section 54 of this 1952 Act incorporates chapter 37, section (3) of the Statutes of 1949 that granted the Supreme Court of Canada the “exclusive ultimate appellate civil and criminal jurisdiction within and for Canada . . .” *Id.* at n.1.

38. See Privy Council (Limitation of Appeals) Act 1968, No. 36 (Austl.). This is an act that limits the matters in which Special Leave of Appeal from the High Court of Australia to Her Majesty in Council can be obtained. See also Privy Council (Appeals from the High Court) Act 1975, No. 33 (Austl.) (furthering the limitations of matters in which “special leave of appeal from the High Court of Australia to Her Majesty in Council may be asked”); Australia (Request and Consent) Act 1985, No. 143 (Austl.) (granting the request to the United Kingdom by the Parliament and Government of the Commonwealth of Australia to terminate appeals “to Her Majesty in Council”); Australia Act 1986, c.2, page 5, § 11 (U.K.) (stating that “no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise . . . from or in respect of any decision of an Australian court.”). Finally, see the equivalent request Acts of each Australian State, as each of the States had to pass an act along the same lines as the Commonwealth (mirror legislation), otherwise the United Kingdom would not act.

39. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (stating that “comparative analysis [is] inappropriate to the task of interpreting a constitution”); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) (expressing similar views). This attitude is not universally held, however. See *Harding*, *supra* note 8, at 410 nn.3-4. See generally *Clark*, *supra* note 10; *Slaughter*, *supra* note 10 (discussing the role of comparative law in the American legal system); *Tushnet*, *supra* note 10 (same).

significant trends and patterns of use possible. With the original choice of the United States for the study in 1987, the unique position of the United States vis-à-vis the remainder of the common law world (including Australia) made it an attractive selection as a sample for consideration. As a country with a legal system with origins in the English common law, the United States would have a heritage of legal concepts well known elsewhere in the common law world, but being completely autonomous of English control for two centuries, courts in the United States would have been able to resolve legal issues and develop legal principals in ways which could provide a useful contrast to the orthodox development found elsewhere in the common law world.

For the continuation of the study on the High Court of Australia's use of international judicial authority through the end of the twentieth century, United States authority remained a natural choice as a sample for the same reasons it was originally selected. This decision was further justified by the United States' emergence in the latter half of the twentieth century as the leading commercial and political power in the world. The study of the High Court's use of United States judicial authority enables a consideration of the High Court's practices in order to establish whether there are identifiable historical trends or patterns of use of authority based upon objective evidence. Once developed, this evidence could shed light upon the processes by which the legal culture of Australia has been affected by international developments such as those arising from within the United States.⁴⁰

In its initial stages, the empirical study undertaken evolved through a process of trial and error. However, the methodology, once refined, was applied as consistently as possible throughout the study. When the study first commenced, there were no full text electronic databases with the judgments of the Australian High Court.⁴¹ Consequently, to ascertain the extent to which the judiciary of the High Court of Australia relied upon American judicial pronouncements, a physical review of the judgments of the Australian High Court from 1901 to 1990⁴² as reported in the

40. The High Court of Australia has referred to judgments originating from a number of countries, including many not conventionally considered by common law judges. *See, e.g., Commonwealth v. Yarmirr* (2000) 208 C.L.R. 1, 20-21 (citing judgments from Canada, New Zealand, and Sweden, along with other United Nations authority). In contrast to the frequent use of United States judgments observed in the study, these were not considered statistically significant enough to warrant specific identification and analysis.

41. Presently, however, there is a full-text electronic database with such judgments. *See The Australian Legal Information Institute*, <http://www.austlii.edu.au/>.

42. Begun in 1987, the study was updated in 2000 by use of the original methodology to 1990, with the total for the decade 1981-1990 included in this report.

Commonwealth Law Reports was undertaken. The methodology used, which is described more fully in the original Adelaide Law Review publication,⁴³ required the manual searching of each volume for references to decisions of United States courts.⁴⁴ Each reference to a United States (state or federal) case report which was identified in the Commonwealth Law Reports was listed according to the page where it appeared in the Commonwealth Law Reports.⁴⁵ During the initial listing, the topic area for which the case was considered relevant and the name of the Justice who had referred to the case were noted.⁴⁶

In quantifying the use of United States authority, a relatively basic method of identifying and counting case references was employed. In order to minimize discretionary bias in this process, no distinction was made between a case name citation and reference to a case that indicated how the case was perceived (either positively or negatively) by the Australian judiciary. Although this method of data collection undoubtedly lacked sophistication, it nevertheless served to identify the number of times that the judiciary of the High Court considered the American perspective relevant at all.⁴⁷ Whether American authorities, once considered by an Australian

43. See von Nessen, *supra* note 11, at 187-93.

44. American cases referred to in each volume of the Commonwealth Law Reports (through volume 64) were identified by reviewing the table of cases cited in each volume for references to American case report series. The incidents of such citations at that particular page were noted and catalogued by reference to the Commonwealth Law Report page number indicated in the table of cases cited. Because such cases were normally included in the table of cases cited with reference only to the first page of each High Court case upon which they appeared, subsequent pages of each Australian case were reviewed for repeat references to identified United States cases. This technique had to be abandoned for volumes 65 forward of the Commonwealth Law Reports because from that volume, the table of cases contained only name references (rather than full citations). As a result, cases from the United States in later volumes were identified by the painstaking task of reviewing each page of the Commonwealth Law Reports. All cases referred to in the Commonwealth Law Reports are given their full citation in a separate footnote each time mentioned, easing the task of identifying American cases greatly. For the period 1987 to 2002, an equivalent process was done by use of a computer search. To assure comparability the computer identification method was undertaken for earlier volumes on a test basis, with no significant variation from the original, manual searches found.

45. This process, though somewhat inexact, was applied consistently throughout the survey. All references, no matter how brief, were noted. On the other hand, repeated references to the same case within close proximity were identified as only one reference. Thus, the mentioning of a particular case followed by a brief extract from the case was identified as only one reference. Where a repeat of a reference occurred at a significant interval from the original citation, the repeat reference was also noted.

46. The methodology and purview of the original study evolved slightly from its origin. While the list included the citing Justice in the original data collection, no analysis of that was undertaken. As a result, the later supplementation of the original study did not list the particular Justice making use of the United States judgment. References to American decisions which appeared in the Commonwealth Law Reports, but outside of the actual judgments (such as in briefs of counsel and questions from the bench) were also initially identified. Since these references were not a subject of analysis, they were not noted in later data collection.

47. American authority is merely persuasive in Australian courts, and may, of course, be totally disregarded. However, the American perspective is often considered relevant because of both its

justice, were followed or rejected would undoubtedly be a matter of interest. Due to possible ambiguities which could arise in making that judgment, however, these characterizations were not attempted.⁴⁸

After the initial data collection, the total references found within the Commonwealth Law Reports were summarized, initially by volume and then by year of judgment. This data was then further analyzed, comparing the number of High Court citations of United States cases in each year or decade.⁴⁹ Increasing judicial output since the inception of the Commonwealth Law Reports in 1901 (partially due to the change through the years in the use of joint judgments) was considered; however, as discussed below, these were not considered to be material to the study findings.⁵⁰

In addition to an analysis of the total incidence of usage of cases from the United States, the area of law for which such cases were used was also considered. Both selecting and defining the categories into which the cases were to be sorted provided certain challenges which revealed themselves as the data collection commenced. The categories which were eventually used (the original reasons for their selection and their description are more fully described in the original study)⁵¹ were selected to facilitate a useful analysis throughout the century, allowing for the possibility of legal development which was unanticipated at the commencement of the process. As a consequence, five relatively specific areas—constitutional law, public law, contracts and commercial law, tort law, and criminal law—were supplemented by three more generic classifications: other common law areas, other statutory areas, or miscellaneous other legal areas. Determining the limits of each classification itself provided some complexity. For example, certain matters such as individual rights and freedoms are dealt with in the United States Constitution, but are generally not considered in

shared common law heritage with Australia and the Australian Constitution's modeling after certain provisions in the American Constitution. See discussion *infra* note 53 and accompanying text.

48. Since cases from the United States are not strictly authoritative in Australia, references to such cases can be used without any need to indicate whether they should be followed, rejected, or modified. See discussion *infra* note 53 and accompanying text. Consequently, there frequently is no direct judicial statement indicating what is thought of such cases.

49. The cases were classified based upon the date of the judgment rather than the date of the volume.

50. See *infra* notes 54, 58; see also Edward McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunal*, 31 CAN. B. REV. 595, 595-625 (1953) (comparing the practice of the Privy Council in relation to joint and individual judgments with those of the final courts of appeal of Australia, South Africa, India, Ireland, Canada, and the United States).

51. See von Nessen, *supra* note 11, at 187-193.

the Australian Constitution.⁵² Such matters were resolved by identifying a classification which would make some sense in both jurisdictions. The following descriptions indicate why the five specific areas were chosen and how the descriptions were applied.

A. Constitutional Law

Selection of constitutional law as a topic was the most obvious of choices due to the fact that the United States Constitution served as a model for the federal aspects of the Australian Constitution.⁵³ The data collection immediately revealed this to be an appropriate choice, as resolution of issues concerning the division of powers in the new Australian federation provided ample opportunities for consideration of United States authority, particularly in the first decade of federation. Since this classification was intended to be appropriate in both jurisdictions, the cases dealing with the United States Bill of Rights and matters inappropriate to a parliamentary form of government were not considered as constitutional cases unless they were used in relation to an Australian Constitutional equivalent. Matters of constitutional interpretation were also included in this category, providing some flexibility for new developments.

B. Public Law

Due to the initial determination that matters would be included as constitutional only if so considered in both Australia and the United States, public law provided a natural category for issues concerning the proper functioning of government not covered in both constitutions. Administrative law and the relationship among the branches of government, such as statutory interpretation, were categorized as public law.

C. Contracts and Related Commercial Law

Because both the United States and Australia are common law jurisdictions, contract and related commercial law were selected as an appropriate category for consideration. Included within this category were cases concerning contract law and other related areas, such as agency. Banking, insurance and aspects of partnership law were also included.

52. Australia Constitution Act, 1900, 63 & 64 Vict., c. 12 (U.K.).

53. *R. v. Kirby* (1956) 94 C.L.R. 254, 275 ("Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism"); see also ERLING M. HUNT, *AMERICAN PRECEDENTS IN AUSTRALIAN FEDERATION* (1930); JOHN QUICK & ROBERT GARRAN, *ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (1901).

D. Tort Law

Tort law as a category was relatively easy to define, including within its parameters negligent torts, intentional torts and closely related incidental issues. Although these matters rarely involve international aspects, it is a legal area where policy considerations prevail. It was thus considered as a topic where international perspectives might be considered.

E. Criminal Law

This classification (as with that of torts) was also fairly straightforward in its description. Many of the American Bill of Rights cases dealing with criminal procedural issues—self-incrimination, search and seizure, and double jeopardy—were included in this category.

To ensure that all cases would be captured by the analysis, the remaining cases were classified into one of the following three more generic categories.

F. Other Common Law Areas

This included areas of law historically developed through the judicial process even though statutory interventions of significance may have occurred in Australia or the United States. Property law, equity (including fiduciary duties of partners, agents, and directors), evidence, and family law were included in this area.

G. Statutory Areas

This topic area included legal principles primarily originating with statutes, and included insolvency regulation, corporate law, intellectual property, taxation, and trade practices (antitrust).

H. Miscellaneous Others

Predominant in this group of cases, originally selected as a generic catch-all, were international law, maritime law, and labor law. This classification also provided a mechanism by which newly developing areas of law could be classified.

During the twentieth century, the High Court of Australia experienced significant changes in its practice and output, the same way other courts did

over such a period. In view of the changes in both workload and output,⁵⁴ it was necessary to consider whether these matters would be likely to undermine the validity of any observations comparing citations in various parts of the twentieth century. Despite the variations noted, these were not considered material to the findings of this study in relation to the mix of topic areas in which the High Court's use of American authority was found.⁵⁵ As with the original study, where this Article presents the total incidents by decade, it is without adjustment for increase in workload or output. Such increased output of the High Court would, consequently, be a

54. A test study performed in the original 1987 study considering the reported decisions of the High Court during the period is reproduced below:

<u>Decade</u>	<u>Volumes</u>	<u>Sample</u>	<u>Pg/Vol</u>	<u>Cases/Vol</u>	<u>Pg/Case</u>
1901-1910	10	1 - 9*	851.6	46.7	18.2
1911-1920	19	10 - 28	671.6		
1921-1930	15	30 - 39	598.2	33.1	18.1
1931-1940	21	46 - 55	680.5		
1941-1950	18	72 - 81	652.9	28.3	23.1
1951-1960	22	85 - 94	654.3		
1961-1970	19.5	85 - 94	655.1	32.1	20.0
1971-1980	22.5	125 - 46	675.9		
1981-1987	18	154 - 64	685.5	25.0	27.42

*Includes volumes 4 (pt. 1) and 4 (pt. 2) as two volumes.

Two counterbalancing trends were identified in relation to the practice of the High Court during the period of the study: the number of judgments selected for publication in the Commonwealth Law Reports from each decade had decreased while the length of each judgment reported therein had increased in size. When the total pages required per decade were estimated by multiplying the volumes for each decade by the sample average pages per volume, a more precise comparison of the page volume for each decade's reported judgments was estimated:

<u>Decade</u>	<u>Total Pages</u>	<u>Comparison to Avg.*</u>	<u>Over (under) Avg.*</u>
1901-1910	8,516	69.1%	(30.9%)
1911-1920	12,760	103.5	3.5
1921-1930	8,973	72.8	(27.2)
1931-1940	14,290	115.9	15.9
1941-1950	11,752	95.3	(4.7)
1951-1960	14,388	116.7	16.7
1961-1970	12,774	103.6	3.7
1971-1980	15,207	123.3	23.3
1981-1987	12,339	100.0 (7 yrs.)	42.9

*Average calculated without inclusion of 1980-1987 period.

The 1980s appear to show a marked increase in the total output of pages reported by the High Court, with the first seven years requiring as many pages (12,339) as the average number of pages for each already completed decade (12,333). For a more complete description of this issue, see generally Friedman et al., *supra* note 18, at 799-808; Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain, and the U.S.A.*, 24 AM. J. COMP. L. 43 (1976); von Nessen, *supra* note 11, at 192.

55. This aspect of the study's findings is unaffected by population size. In relation to the total number of citations per decade, the increased output would partially explain any increase noted, but not any decrease noted.

contributing factor in relation to increased use of United States cases in later decades.

IV. DATA SUMMARY OF ORIGINAL HIGH COURT STUDY

A summary of the data derived during this project (and completed through 1990)⁵⁶ is included as Table 1, which lists the total number of United States citations by decade and by topic area:

Table 1
References to United States Cases by the High Court 1901-1990

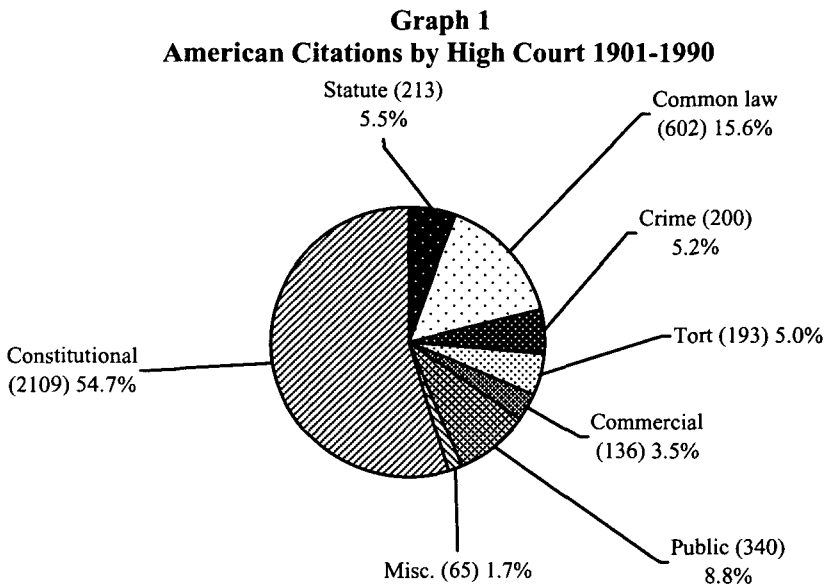
<u>Decade</u>	<u>Total</u>	<u>Con</u>	<u>Pub</u>	<u>Comm</u>	<u>Tort</u>	<u>Crim</u>	<u>CL</u>	<u>SL</u>	<u>Misc</u>
1901-1910	565	404	46	23	7	9	22	47	7
1911-1920	474	341	46	11	22	2	30	16	6
1921-1930	273	203	6	21	8	0	28	5	2
1931-1940	269	130	7	16	36	7	22	45	6
1941-1950	366	284	29	6	0	7	16	11	13
1951-1960	296	190	22	4	42	3	31	3	1
1961-1970	190	95	14	6	37	8	14	16	0
1971-1980	329	92	52	12	10	30	90	17	26
1981-1990	1096	370	118	37	31	134	349	53	4
Totals	3,858	2,109	340	136	193	200	602	213	65

The data represented in Table 1 reveals two important aspects of the Australian use of United States authority during the period 1900-1990, each of which was identified as relevant in the original study findings: (1) constitutional law and theory predominated in the type of United States authority considered by the High Court during the entire period; and (2) The Australian High Court's use of cases from the United States varied significantly both in volume and in topic area during that part of the century covered by the original study. Within this second finding were two subsidiary observations: (1) The volume of citations was significantly higher in the periods 1900-1910 and 1971-1990; and (2) The relative predomination of Constitutional issues in the early decades was replaced in later years with a broadening range of legal areas.

56. The original study's totals ended with volume 164 of the C.L.R. These totals were supplemented with the addition of citations from volumes 165 to 172 (using the same methodology as the original study), representing 317 additional citations in 38 different cases. These consisted of constitutional law (142), public law (32), commercial law (1), tort law (none), criminal law (38), common law (79), statutory law (25) and miscellaneous (none).

While the observations noted above are illustrated in Table 1, these findings are made more graphic by reference to the following charts comparing the High Court use of United States authority both by decade and by topic area of reference.

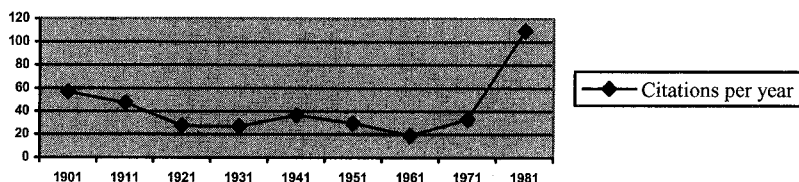
Graph 1, below, represents the subject matter distribution of the data for the entire period of 1901-1990. As expected, constitutional law cases represented the largest portion (54.7%) of all of the references to United States judicial authority by the High Court during the first ninety years of Australian nationhood. Aggregating the closely related topic area of public law brings the total to nearly two-thirds of all citations (63.5%). By contrast, common law (15.6%) is the only other topic with more than 6% of the total population.



The second observation the study revealed concerned the periods during which the citation of United States authority was popular. Graph 2, below, indicates the number of High Court citations of United States authority per annum for each of the first nine decades of the twentieth century. The two decades in which reference to United States cases were most common were the periods 1901-1910 (56.5 citations to United States authority per annum) and 1981-1990 (109.6 citations to United States authority per annum). The graph dramatically indicates the steady decline in the use of United States citations from a high point immediately after Australian federation to the low point in the 1960s (with a mere 19.0 United States citations per year). Although a slight increase was observed for the period 1971-1980, the most

dramatic increase occurred in the period 1981-1990 (109.6 references to United States authority per year).

Graph 2
Annual United States Citations by High Court 1901-1990



While the trend represented in the above graph is extremely pronounced, at least some portion of that increase is arguably attributable to changes in the High Court's workload and total output during the century.⁵⁷ As reported in the original study, even after converting a reference per page basis to adjust for the variance in the output of the High Court in total page volume from one decade to another, the essential nature of the trend remains, with the differential between the first and last decades reduced significantly.⁵⁸ Nevertheless, even as thus adjusted, citations in the first decade of the original study (66.3 references per 1,000 pages in the Commonwealth Law Reports) and the last decade of the study (63.1 references per 1,000 pages in the Commonwealth Law Reports) are significantly greater than any other decade, and nearly four times the

57. See *supra* note 54.

58. *Id.* After adjusting for differences in the total page volume, the data (citations per 1,000 pages in the Commonwealth Law Reports) would indicate the following trend:

Decade	Citations	In Decade*	1000 C.L.R. Pages
1901-1910	565	8,156	66.3
1911-1920	474	12,760	37.1
1921-1930	273	8,973	30.4
1931-1940	269	14,290	18.8
1941-1950	366	11,752	31.1
1951-1960	296	14,388	20.6
1961-1970	190	12,774	14.9
1971-1980	329	15,207	21.6
1981-1987	779	12,339	63.1

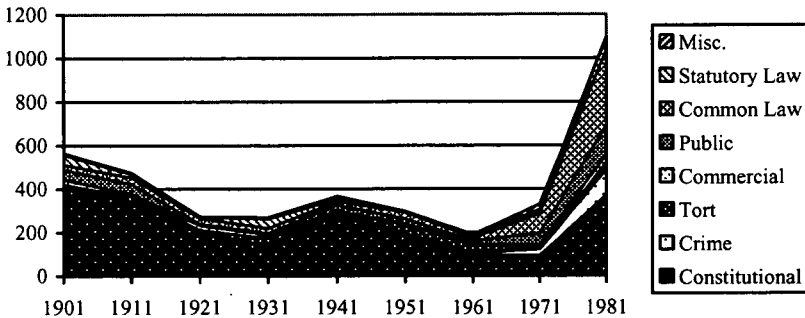
*As estimated *id.*

See also von Nessen, *supra* note 11, at 197 n.31 (discussing the trend in further detail).

measurement at the low point in the 1960s (14.9 references per 1,000 pages in the Commonwealth Law Reports).

Finally, the original study revealed not only a significant variance in the use of United States authority by the High Court from decade to decade but also significant variation in the subject matter mix of such use. Graph 3 demonstrates the number of citations in each decade distributed by topic area:

Graph 3
United States Citations by High Court 1901-1990

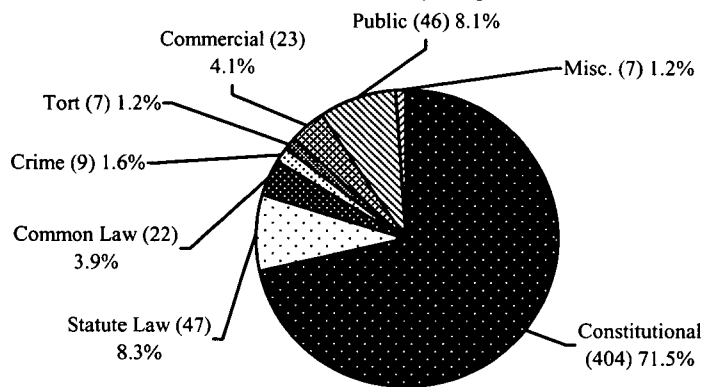


As might be expected with a new federation, the proportion of constitutional law cases is extremely high in the first two decades after its commencement. This high representation of constitutional law authority decreased relatively steadily after the first decade (with a brief surge between 1930 and 1940). Conversely, the proportion of United States citations in relation to all of the other legal categories increased after 1910.

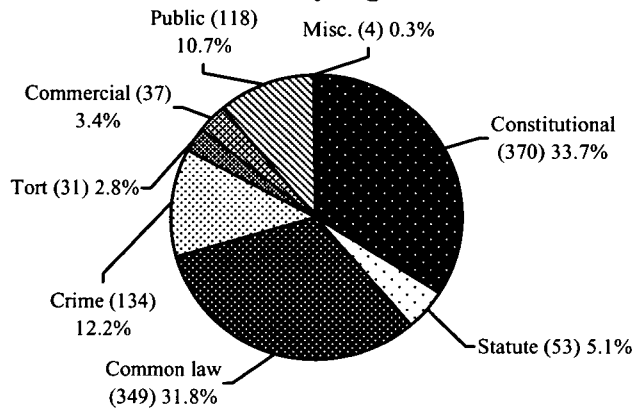
The concentration of cases concerning constitutional law in the first decade and the greater mix of cases referred to by the High Court in the last decade of the original study are illustrated in Graph 4⁵⁹ and Graph 5, below. Contrasting these two decades, the percentage of constitutional law cases referred to by the High Court dropped from 71.5% (1901-1910) to 33.7% (1981-1990) of the United States cases cited by the High Court during those decades.

59. Similar graphic illustrations are also provided in von Nessen, *supra* note 11, at 200-01. With the exception of Graph 4, each of the Graphs in this article has been modified to account for the elimination of the extrapolation of findings for the period 1981-1990 which were reported in the original study. See von Nessen, *supra* note 11, at 195-201. Graph 4 represents only the 1901-1910 decade and has been unaltered, except in presentation, from the original. See *id.* at 200.

Graph 4
United States Citations by High Court 1901-1910



Graph 5
United States Citations by High Court 1981-1990



The data collected on the Australian High Court’s use of United States authority during its first nine decades of nationhood is informative not only in relation to positive observations. The distinct lack of any use of authority

from the United States in relation to some legal areas is in itself worthy of comment. The study revealed some use of United States authority in the areas of commercial law, tort law, and criminal law, but significantly less use in the areas of law with a substantial legislative basis, such as evidence and civil procedure. The lack of cases concerning legislative-based legal areas is indicative of the fact that during this period, there were few pieces of Australian legislation directly copied from the United States.⁶⁰ Another factor that would contribute to the lack of Australian reference to United States cases interpreting statutes is the fundamentally different approach taken in the United States and Australia to statutory interpretation prior to 1981.⁶¹ The change in the interpretive technique employed in Australia, mandated by legislative enactment in 1981, might also explain an increase in the incidents of case references to statutory based areas of law since that time.⁶²

Perhaps the most significant, and least surprising, of the observations from the original study concerns the use of the United States cases in assisting to interpret the Australian Constitution in the High Court's first ten years. Since the United States Constitution served as a model for parts of the Australian Constitution,⁶³ it is not surprising that the High Court sought to benefit not only from established techniques for interpreting a written constitution, but also from United States doctrine as an aid to interpreting the purpose and intent of particular Australian provisions.⁶⁴ The great variation

60. The use of United States legislative models is rare, but increasing in frequency since the completion of the original study. See, e.g., Paul von Nessen, *The Americanization of Australian Corporate Law*, 26 SYRACUSE J. INT'L L. & COM. 239, 239 (1999) (noting that Australian corporate law was becoming much more similar to American law); Paul von Nessen, *Corporate Governance in Australia: Converging with International Developments*, 15 AUSTL. J. CORP. L. 189, 190 (2003) (noting that "practices in Australia continue to converge in an international context with those adopted in other countries, particularly with those of other common law countries such as the United States and the United Kingdom."). The first significant piece of Australian legislation copied from the United States was the Trade Practices Act 1974. See Bob Baxt, *The Trade Practices Act 1974*, 62 LAW INST. J. 1191, 1191 (1988); STEPHEN G. CORONES, *COMPETITION LAW IN AUSTRALIA* 37 (3d ed. 2004).

61. See von Nessen, *supra* note 11, at 202. The statutory construction techniques in Australia prior to 1981 relied predominantly upon construction from the text of the statute itself. *Id.* Sections 15AA and 15AB of the Acts Interpretation Act 1901 (Austl.), passed in 1981, indicate that legislative interpretation should promote the purpose or object underlying an Act, and that extrinsic evidence could be used in ascertaining what construction should be placed upon a statute. See Acts Interpretation Act 1901, §§ 15AA-AB (Austl.), available at <http://scaletext.law.gov.au/html/pasteact/1/606/0/PA000300.htm>. This enactment consequently brought Australian statutory interpretive techniques into alignment with long held practice in the United States. See *Chaffee v. San Francisco Pub. Library Comm'n*, 36 Cal. Rptr. 3d 1, 4 (Ct. App. 2005) (stating that when statutes in the United States are susceptible to more than one interpretation courts should look to extrinsic aids).

62. See discussion *infra* note 71 and accompanying text.

63. See sources cited *supra* note 53.

64. A comparison of the Australian High Court's practice to that of other non-American judicial tribunals was also undertaken in 1987 in order to assure that any trends identified would be properly attributed to circumstances peculiar to Australia's High Court rather than to any factors equally

in the use of such authority in later decades, however, warrants closer consideration.

V. EXPLANATIONS FOR THE TRENDS REVEALED IN THE ORIGINAL STUDY

Although the observation and description of trends revealed by a study such as that originally undertaken primarily requires consistency and accuracy in the recording of data, drawing conclusions from the observations recorded necessitates analytical skills clearly subjective in nature. At the time of the original observations of the High Court of Australia's changing practice in its use of American case authority,⁶⁵ several hypotheses were proposed as providing the explanations for the various trends observed. Reviewing those explanations with the hindsight of fifteen years reinforces those conclusions in some instances, but it also provides the opportunity for further questioning whether the hypotheses proposed should now be reconsidered.

The data collected through 1990 reveals several things about the High Court of Australia's use of United States case authority. The most apparent observation is that throughout the first ninety years of its existence, the High Court of Australia referred to United States authority in the area of constitutional law (and the related area of public law) far more frequently than any other area of law. The simplest explanation of this observation is that the Australian Constitution is modeled upon the United States Constitution, and consequently the High Court would necessarily find assistance by considering the views of the United States Supreme Court on

applicable to such other tribunals. During this period, the New Zealand Supreme Court and Court of Appeal were found to refer to American decisions less than ten times per year. The Australian High Court's use, by contrast, was nearly three times that frequency. The control study of the Canadian Supreme Court during the twentieth century, on the other hand, revealed significant references to American case authority, with a notable increase after the acceptance by Canada of the Charter of Rights (Canadian Charter of Rights and Freedoms, Part I of The Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.)). See von Nessen, *supra* note 11, at 207-09; see also Stephen B. Nelson, *Canadian Use of American Precedent Under the New Charter of Rights and Freedoms*, 3 CAN.-AM. L.J. 161 (1986); Peter Hogg, *The Charter of Rights and American Theories of Interpretation*, 25 OSGOODE HALL L.J. 88 (1987). A comparison of the two sample years confirmed the increase as result of that factor with United States cases being used approximately ten times more after the Charter than before. As might be expected, further analysis confirmed that around three quarters of the United States cases were referred to in Canadian cases concerning the Charter of Rights. These control observations support the conclusion that any trends observed in the practice of the Australian High Court are attributable to factors which are particular to Australia rather than to any broader explanation.

65. The extrapolation of the findings for the period 1981-1990 have been replaced by actual observations as indicated. See discussion *supra* note 56 and accompanying text. This change accentuates the trends observed for that decade and, to some extent, confirms the desire for the further observations undertaken below.

the constitutional issues that both nations shared.⁶⁶ Even prior to this study, the use made by the High Court of United States authority in relation to particular provisions of the Australian Constitution had warranted comment.⁶⁷ Similarly, international commentators have also noted such use of United States authority by the courts of selected other countries whose constitutions have common elements with that of the United States.⁶⁸

Concentrating upon the presence of relatively high number of cases dealing with constitutional issues, however, obscures the complementary observation that during this period, there were very few references by the High Court to United States authority concerning contract law, tort law, property law, or statutory law. In relation to the common law based areas of the law, the adherence to orthodox principles and authority could be explained by the fact that during most of the period of observation, the Australian High Court itself could not diverge too far from the English view, lest an appeal to the Privy Council⁶⁹ put such adventurism to an end.⁷⁰ On

66. The reasons for this have been discussed in numerous articles and books, and the explanations for reliance upon United States authority vary depending upon the particular thesis to be supported. Of most recent interest has been the relationship between the interpretation of the United States Constitution and the acceptance of such interpretation as part of the original intent of the Australian framers. See, e.g., BRIAN GALLIGAN, *POLITICS OF THE HIGH COURT: A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA* (1987); Gregg Craven, *Original Intent and the Australian Constitution—Coming Soon to a Court Near You?*, 1 *PUBL. L. REV.* 166 (1990); Brian Galligan, *Realistic "Realism" and the High Court's Political Role*, 18 *FED. L. REV.* 40 (1989); Jeffrey Goldsworthy, *The High Court, Implied Rights and Constitutional Change*, 39 *QUADRANT* 46 (1995); Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, 24 *MELB. U.L. REV.* 677 (2000); Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1 (1997); Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 *MELB. U.L. REV.* 1 (2000); Jeremy Kirk, *Constitutional Interpretation and a Theory of Evolutionary Originalism*, 27 *FED. L. REV.* 323 (1999); David Lyons, *Original Intent and Legal Interpretation*, 24 *AUSTL. J. LEG. PHIL.* 1 (1999); Dan Meagher, *New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution*, 24 *SYD. L. REV.* 141 (2002); Haig Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia*, 25 *FED. L. REV.* 211 (1997); David Tucker, *Textualism: An Australian Evaluation of the Debate Between Professor Ronald Dworkin and Justice Antonin Scalia*, 21 *SYD. L. REV.* 567 (1991).

67. See Julius Stone, *A Government of Law and Yet of Men Being a Survey of Half a Century of the Australian Commerce Power*, 25 *N.Y.U. L. REV.* 451 (1950) (considering the High Court's practice of using United States authority in interpreting the Australian Constitution's frequently litigated commerce clause found in section 92).

68. See *supra* note 66. Interestingly, the absence of the reverse (United States Supreme Court consideration of other countries' authority with similar constitutional provisions) is also noteworthy.

69. See Judicial Committee Act, 1833, 3 & 4 Will. 4, c. 41, § 3 (Eng.); Judicial Committee Act, 1844, 7 & 8 Vict., c. 69, § 2 (Eng.).

70. The conventional rule of precedent is that "every court is bound to follow any case decided by a court above it in the hierarchy." RUPERT CROSS, *PRECEDENTS IN ENGLISH LAW* 6 (2d ed. 1968). This would mean that a decision of the Privy Council would be followed by all jurisdictions with an appeal to that court. See *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127, 145; *Hall & Co. v. McKenna*, [1926] IR 402, 404 (discussing the origin and role of the Privy Council); P.G. McHugh, *The Appeal of "Local Circumstances" to the Privy Council*, 1987 N.Z. L.J. 24, 25-26 (1987) (same); Andre Tunc, *The Not So Common Law of England and the United*

the other hand, the lack of consideration of United States authority in relation to statutory based areas of law throughout the period could be explained by several factors. First, Australia had not used United States legislative models for its own legislation to any extent prior to the mid-1970s, and consequently, cases from the United States would be of little assistance to Australia in interpreting a precise statutory equivalent. Second, Australia, like much of the common law world and unlike the United States, construed legislation strictly and without reference to extraneous material prior to 1981.⁷¹ Finally, the judiciary in the United States was required to consider a broader range of constitutional provisions (including a Bill of Rights with no direct equivalent in Australia) when ascertaining whether a statutory provision might be constitutionally invalid.⁷² Each of these factors meant that throughout most of the period of the study, United States jurisprudence relating to the interpretation of statutes was of limited value in Australia.

Further conclusions arising from the study's observations concern the variation in the mix of cases from decade to decade, which are somewhat more complex to explain. The first observation concerning the temporal variation of High Court usage indicates that constitutional law cases were most commonly considered by the High Court in the first and second decade after federation, with a significant reduction continuing until the period of 1981-1990 (when the incidents of citation of all types of cases increased). One plausible explanation of this trend is that the High Court used United States authority as a starting point for the development of its own constitutional jurisprudence, but discontinued referring to United States cases as the years proceeded, preferring instead to cite its own judgments in succeeding years. This explanation, however, would only be valid if it were common practice to desist from referring to a United States case despite continuing to agree with the principle espoused by it, because a more recent

States, or, Precedent in England and the United States, A Field Study by an Outsider, 47 MOD. L. REV. 150 (1984) (same).

71. See Acts Interpretation Act 1901 (Austl.) §§ 15AA, 15AB; see also discussion *supra* note 61 and accompanying text (discussing statutory construction techniques in Australia). The narrow constructionist view which led to the change in the Acts Interpretation Act is discussed in Geoffrey Lehmann, *The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism*, 9 MONASH U.L. REV. 115 (1983).

72. See D.J. Galligan, *Judicial Review and Democratic Principles: Two Theories*, 57 AUSTL. L.J. 69, 69-70 (1983); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 14-209 (1984) (discussing how the Supreme Court has interpreted constitutional rights); Sanford Kadish, *Judicial Review in the High Court and the United States Supreme Court*, 2 MELB. U. L. REV. 4, 4-5 (1959-60); The Honorable Mr. Justice F.C. Hutley, *The Legal Traditions of Australia as Contrasted with Those of the United States*, 55 AUSTL. L.J. 63, 66 (1981).

Australian case had already indicated that the principle had been accepted (a practice which would be rather novel in the common law). Given the number of issues which might arise in constitutional litigation even after a number of years, the shift to the use of established Australian precedents would not seem to account for such a sudden reduction in the use of United States cases.

An alternative hypothesis to explain the reduction in constitutional cases (and one more suited to the sudden change observed) is that United States constitutional jurisprudence was no longer seen by the justices of the High Court as providing appropriate guidance. As originally noted in the 1987 study, this explanation is consistent both with the development of Australian constitutional jurisprudence and with the changes in United States constitutional jurisprudence causing it to diverge significantly for much of the period of the study from the prevalent views in Australia concerning constitutional interpretation.

Initially, many of the Justices of the High Court (including a number actually involved in the drafting of the Australian Constitution) preferred to embark upon interpretation of a written constitution with guidance from the United States Supreme Court, a tribunal with over a century's experience in that process. In 1920, however, the High Court acknowledged in *Amalgamated Society of Engineers v. Adelaide Steamship Company*⁷³ that the interpretive techniques should reflect the legal culture from which Australia had arisen, and that the interpretation of the Australian Constitution, an Act of the Westminster Parliament, was more appropriately interpreted by English interpretive techniques:

But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state, be recognised as standards whereby to measure the respective rights of the Commonwealth and the States under the Australian Constitution.⁷⁴

In addition to the reassertion of the fundamental British rather than American nature of Australian legal culture, *Engineers* perhaps also turned away from United States authority for a far less theoretical reason. At the time of *Engineers*, the United States constitutional jurisprudence did not support the view of the Federal/State balance of powers favored by the High

73. (1920) 28 C.L.R. 129.

74. *Id.* at 146 (joint judgments of Knox, C.J., & Isaacs, Rich & Starke, J.J.). See also McWhinney, *supra* note 50, at 603.

Court Justices then in the majority.⁷⁵ It is interesting to note, however, that the Australian High Court exhibited a degree of frustration from time to time with the imperial constraints under which it was required to act.⁷⁶

A second factor which would have made United States constitutional jurisprudence less attractive to the Australian judiciary for much of the study period was the abandonment by the United States Supreme Court of a narrow construction of the commerce clause to allow the pursuit of New Deal reforms during the Great Depression.⁷⁷ Having adopted an interpretation of the much-litigated Australian commerce clause consistent with United States cases increasingly questioned in the United States itself, the Australian High Court, wishing to continue with its own views, was faced with the uncomfortable choice of either using United States authority discredited in its home country or failing to refer to United States authority on this point at all. This, along with the decision in *Engineers*, would explain a significant reduction in the use of United States constitutional cases beginning in the 1920s and continuing through the middle of the twentieth century.

The final observation concerning the use of United States authority through the initial study period is that there was a marked increase in the use of United States authority in the full range of topic areas in the final decade of the study. The most likely cause for such a significant development is one which itself is of great importance, and the changes to the role of the Australian High Court that occurred between 1975 and 1985 provide a likely explanation of the trend observed.

Prior to 1975, the High Court of Australia was the ultimate Australian appellate court, serving not only as an arbiter of constitutional and federal issues like the United States Supreme Court, but also serving as a general appellate court charged with the responsibility of hearing appeals from the state supreme courts on an unlimited range of matters, including those arising from both common law and state statutes. With a prevailing attitude throughout the British-dominated common law world being to retain as uniform a development of the common law as possible,⁷⁸ the right of appeal

75. See D.J. GALLIGAN, *POLITICS OF THE HIGH COURT: A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA* 101 (1987).

76. See, e.g., *Parker v. The Queen* (1963) 111 C.L.R. 610, 632 (judgment of Dixon, C.J.); *Skelton v. Collins* (1966) 156 C.L.R. 94, 134 (judgment of Windeyer, J.).

77. See, e.g., *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

78. See Sir Victor Windeyer, *Unity, Disunity and Harmony in the Common Law*, 1966 N.Z. L.J. 193 (1966); see also P.S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 1 (1985); Sir Robin Cooke, *Divergences—England, Australia, and New Zealand*, 1983 N.Z. L.J. 297, 297 (1983); David Jackson, *The Judicial Commonwealth*, 28 CAMBRIDGE L.J. 257, 258 (1970). In relation to the

to the Privy Council had continued under the Australian Constitution section 74 from the supreme courts of the new Australian states and from the High Court of Australia on matters aside from those which dealt with “the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States.”⁷⁹

The elimination of appeals from the Australian High Court to the Privy Council occurred in two stages. First, the *Privy Council (Limitations of Appeals) Act 1968* indicated that appeals to the Privy Council from the High Court should not be permitted where the decisions involved the interpretation or application of the Constitution, any law made by Parliament, or any regulation or by-law made thereunder.⁸⁰ Seven years later, the initial elimination of the Privy Council’s appellate jurisdiction affected by the 1968 Act was extended by elimination of all appeals from the High Court to the Privy Council by the *Privy Council (Appeals from the High Court) Act 1975*.⁸¹ From then forward, appeals could not be taken from the High Court to the Privy Council on any matter.⁸²

Despite the elimination of appeals from the High Court to the Privy Council, the development of Australian law continued without constraining influence through 1986, as appeals from the Australian state supreme courts on state issues continued.⁸³ The anomalous situation concerning both the existence of two appellate courts and the precedential effect of Privy Council decisions upon the High Court itself was described in *Viro v. The Queen* in the following terms:

The effect of these legislative changes is extraordinary and perhaps unprecedented. It is that from the Supreme Courts of the Australian States, when not exercising federal jurisdiction, there are two final courts of appeal, neither of which is subordinate to the other. There is no doubt that the decisions of the Privy Council remain binding on the courts of the States. The question is whether they remain binding on this Court. A further question that arises is what course should be taken by the Supreme Court of a State in the event that a

United States, see Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910).

79. Australian Constitution § 74.

80. Sir A.F. Mason, *The Limitation of Appeals to the Privy Council From the High Court of Australia, from Federal Courts Other Than the High Court, From the Supreme Courts of the Territories and from Courts Exercising Federal Jurisdiction*, 3 FED. L. REV. 1, 16 (1968) [hereinafter Mason, *The Limitation of Appeals*].

81. High Court of Australia: About the Court, http://www.hcourt.gov.au/about_02.html (last visited Jan. 20, 2006).

82. *Id.*

83. *Id.* Appeals on federal issues were eliminated by amendment to s. 39(2) of the *Judiciary Act* (Austl.) in 1968.

decision of this Court is in conflict with a decision of the Privy Council.⁸⁴

In 1986, the difficulties caused by having two ultimate courts of appeal were eliminated with the *Australia Act 1986* (U.K.), the *Australia (Request and Consent) Act 1985* (Austl.), and similar state acts that saw the final elimination of appeals to the Privy Council. Under section 11(1) of the *Australia Act*:

Subject to subsection (4) below [transitional provisions], no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise, from or in respect of any decision of an Australian court.⁸⁵

In consequence of these developments, the High Court became the only ultimate court of appeal for all Australian courts as of 1986. These changes meant that the High Court could exercise greater independence and, consequently, broaden its judicial perspectives.⁸⁶ It was hypothesized at the time of the completion of the original study that the more frequent and wider use of United States judicial authority by the High Court reflected both the structural change to the Australian Court hierarchy described above and the

84. *Viro v. The Queen* (1978) 141 C.L.R. 88, 120. This case deals directly with the relationship between the Privy Council and the Australian High Court between 1975 and 1986, providing guidance to the lower courts on how to deal with conflict of authority between the High Court and the Privy Council. See Robert S. Geddes, *The Authority of Privy Council Decisions in Australian Courts*, 9 FED. L. REV. 427, 478 (1978); see also Francis Maher, *Demise of the Privy Council in the Australian Judicial Hierarchy*, 52 LAW INST. J. 524 (1978); Mason, *The Limitation of Appeals*, *supra* note 80, at 1; Edward St. John, *The High Court and the Privy Council*; *The New Epoch*, 50 AUSTL. L.J. 389, 399 (1976).

85. The United Kingdom legislation was passed pursuant to the requests of the Australian governments (Commonwealth and States), to eliminate appeals from the Australian State Supreme Courts to the Privy Council under legislation of imperial force. See *Australia Act, 1986*.

86. In *Cook v. Cook*, (1986) 162 C.L.R. 376, Justices Mason, Wilson, Deane and Dawson observed:

The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.

Id. at 390.

increased confidence of the High Court itself to broaden its perspectives which might occur as a result of these changes.⁸⁷

VI. AN UPDATE OF THE EMPIRICAL STUDY

Between the time of the original study of the use of American precedents by the High Court of Australia (published in 1992) and the preparation of this paper, a number of developments have occurred which justify an update of the original study to see whether the original observations and conclusions remain valid. Two items which particularly motivated this update were the anecdotal observation of greater use of concepts from the United States and other countries by the High Court of Australia and academic discussion pointing to the Australian judiciary as leaders in expanding international perspectives for common law judges. Whether these observations would be confirmed by empirical evidence was one matter which warranted further consideration.⁸⁸

The original empirical analysis reported above and the conclusions drawn as a result of that analysis resulted in three broad observations.⁸⁹ First, constitutional law and theory represented the largest portion of American cases cited by the High Court during the period 1900-1910.⁹⁰ Second, the use of American cases varied in frequency significantly during the original study period.⁹¹ Third, recent years have seen a significant increase of the High Court's use of American cases within a broadening range of legal areas.⁹²

The explanations of the observations that were hypothesized in relation to the original study period could be classified as those which, at the time, provided an explanation of historical trends and those which identified trends likely to continue if the hypothesis were correct. In the former category are the following conclusions:

87. Sir Anthony Mason, Chief Justice of the High Court of Australia, observed the following in the 1987 Wilfred Fullager Memorial Lecture at Monash University:

There is, however, every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. In deciding what is law in Australia we should derive such assistance as we can from English authorities. But this does not mean that we should account for every English judicial decision as if it were a decision of an Australian court. The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.

See Sir A.F. Mason, *Future Directions in Australian Law*, 13 MONASH U.L. REV. 149, 154 (1987). This was also reported in von Nessen, *supra* note 11, at 218 n.81.

88. For background to the summary provided here in Part VI, see von Nessen, *supra* note 11, at 217-18.

89. *Id.* at 194; see also discussion *supra* notes 66-87 and accompanying text.

90. von Nessen, *supra* note 11, at 194.

91. *Id.*

92. *Id.*

1. The decrease in references to American cases from the 1920s is attributable to the acceptance by the High Court in 1920 (in *Engineers*)⁹³ that Australian jurisprudence (particularly Constitutional jurisprudence) was more appropriately guided by British than by United States practice;
2. The failure of the High Court to consider American precedents prior to the 1970s was partially attributable to a more traditional Australian view about the role of the judiciary (accepting as appropriate a less activist role of the judiciary compared to that accepted for the American judiciary). Both the more limited scope in Australia for consideration of extraneous evidence to assist in statutory interpretation and the absence of a Bill of Rights comparable to the American one were contributing factors; and
3. The disregard by the High Court of American constitutional authority in the 1940s, 50s and 60s can be partially attributed to the United States Supreme Court's acceptance of greater federal power, partially in response to the pressure from President Roosevelt during the 1930s, and partially due to changes arising from change of personnel⁹⁴ at that time.

In the latter category, (identifying trends likely to continue) are the following conclusions, for which further empirical observations would be likely to provide further confirmation:

1. The increased Australian reference to United States cases in the period from 1970 to 1990 was attributable to the elimination of appeals from the High Court of Australia to the Privy Council in 1975⁹⁵ and the elimination of all appeals to the Privy Council from Australia in 1986.⁹⁶ These changes meant that the High Court, as

93. *Amalgamated Soc'y of Eng'rs v. Adelaide S.S. Co.* (1920) 28 C.L.R. 129, 146-47.

94. Alpheus Thomas Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791, 796, 816 (1952); RONALD ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 62, 284 (1986).

95. Privy Council (Appeals from the High Court) Act 1975 (Austl.); see also Privy Council (Limitation of Appeals) Act 1968 (Austl.).

96. Australia (Request and Consent) Act 1985 (Austl.); Australia Acts (Request) Act 1985 (Austl.); Australia Act 1986 (U.K.).

the final court of appeal for Australia,⁹⁷ could exercise greater independence⁹⁸; and

2. In conjunction with the above, the increased use of American authority by the High Court since 1970 was attributable not only to the structural change mentioned, but also to the enhanced status of the High Court. This enhanced status of the High Court (being since 1986 the court ultimately responsible for the interpretation and development of Australian law) has provided it with increased confidence to explore a broader group of legal solutions as alternatives to the conventional British-dominated evolution of the common law in the development of a legal system and laws appropriately adapted to the Australian experience.

While the elimination of appeals to the Privy Council would clearly enable the High Court to consider a broader range of case authority than might formerly have been possible, the frequency and volume of references by the High Court of Australia to the opinions of foreign courts would provide evidence not only of the level of confidence the High Court displays in the task of developing and applying law as adapted to Australian conditions, but also of its comfort with the use of such authority as well. To ascertain whether the observations and conclusions originally made were still valid thirteen years later (a significantly longer period than the period within the original study, which occurred after the constitutional changes in 1986), an update of the empirical study of 1990 was undertaken to ascertain whether the observations then observed continued to be valid and whether the conclusions drawn from those observations were likely to be sustained.

VII. USE OF AMERICAN PRECEDENTS REVISITED EMPIRICALLY

The updated 1990 study relied almost exclusively on citation analysis, employing a basic empirical approach to identify the trends which are summarized above. As outlined in full detail in the original study, the data at the time was developed through physical observations of the Commonwealth Law Reports, noting references to American authority (with greater or lesser difficulty, depending upon the changing style of footnote presentations during the years). Guided by other studies of the period, the original work was intended to make observations with as little subjective judgment as possible.

In the time between the original study and this revisit, there have been many developments which have affected the methodology employed in the

97. See *Viro v. The Queen* (1978) 141 C.L.R. 88; see also Geddes, *supra* note 84; Maher, *supra* note 84; Mason, *The Limitation of Appeals*, *supra* note 80; St. John, *supra* note 84.

98. von Nessen, *supra* note 11, at 217; see also *Cook v. Cook* (1986) C.L.R. 376, 390.

citation analysis update. For this reason, a strict comparison of the results of the original study and this update would not be scientifically appropriate. Nevertheless, even with a change in methodology, it was hoped that this update could confirm whether the trends identified in the original study were continuing.

Since the completion of the original study, there have been numerous changes to legal reporting and research. The arrival of computer-based legal research has meant that research techniques like the one originally employed will most likely be included within a group described as peculiar to that era. One might even assert that the great expansion in the use of empirical studies which commenced in the 1980s in the United States and expanded around the world in later years could be attributable to the fact that computerized research facilitates such studies.

To update the findings of the original study to the year 2002, a search was undertaken of the full text High Court databases of the Commonwealth Law Reports through Lawbook online. The Lawbook database was used in preference to the Lexis Butterworths or other full text databases (such as AustLII, the Australian Legal Information Institute's database) due to the use of the Commonwealth Law Reports in the original study.⁹⁹ The importance of ascertaining the context of "hits" in a search for case authority from the United States will quickly become apparent when the technique that was employed is described. To maintain an element of consistency to the original study, the footnotes of each of the reported cases were also reviewed.

The database¹⁰⁰ was searched for the law reports (by volume) which serve the United States, both federally and for the various states, in order to find citations to United States authority. The federal search terms used included "U.S." (for the official reporter of the United States Supreme Court), "F. Supp." (for the Federal Supplement, the reporter for the Federal District Courts) and "F." (for the Federal Reporter, the reporter for the

99. Although I originally undertook the updated study on the Lexis Nexis database, I was convinced by Professor Maxwell King, Deputy Dean of the Monash Faculty of Business and Economics (former Head of Econometrics and Business Statistics), that the methodology between the two studies should be as indistinguishable as possible despite the differences in time and medium. The use of the electronic database was essentially the same as the physical review undertaken thirteen years ago with the added advantage of the electronic highlighting of 'hits.' The process of reviewing references on the electronic database was also made less difficult by the collection of all footnotes in the electronic version of the Commonwealth Law Reports.

100. During the control comparison discussed *supra* note 64, the same process was applied to a sample number of cases throughout the period.

Federal Circuit Courts of Appeals)¹⁰¹. This process unfortunately resulted in numerous hits which did not relate to a reporter citation from the United States (which were culled by direct observation of the search results). Additionally, this search process did not reveal references to reports using unconventional citation style. The High Court's citation of United States authority has become more consistent and conventional in recent years in comparison to the style observed in the early years of the twentieth century (particularly in relation to the reports of judgments from the American states). For this reason, it was necessary to perform a search for the "unofficial" United States Supreme Court reporter citations; those produced by West Publishing ("S. Ct."), the Lawyers Cooperative ("L. Ed.") and United States Law Week ("U.S.L.W.") were included in the search (using the citation style employed in the Commonwealth Law Reports. These citations were revised to eliminate duplications from the use of parallel citations for one case.

The difficulty encountered in finding citations of opinions of the federal courts of the United States in the High Court database proved minimal in comparison to the search for citations of American state authorities. Utilizing the same technique, search terms were employed to find references to the regional reporters of the United States' West system. West Publishing groups the judgments of the appellate courts of the American states into seven regional reporter series. The seven series of reports include the North Eastern, North Western, South Eastern and South Western reporters (represented by the easily searched and relatively unique abbreviations "N.E.," "N.W.," "S.E.," and "S.W."). The remaining three regional series, Atlantic, Southern and Pacific, caused the greatest difficulty, being abbreviated to the ubiquitous letters "A.," "So.," and "P." When reviewing the footnotes of the cases included within the electronic database of the Commonwealth Law Reports, there were infrequent observations of cases reported in state reporters without the parallel citation to the West Regional Reporters. These rare occurrences were, for purposes of the updated study, included in the appropriate region.

The database revealed citations within cases decided by the High Court between 1991 and 2002.¹⁰² The results of this process were summarized and divided into two time periods: 1991-2000 and 2000-2001. The results of these observations are as follows:

101. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 193 tbl. T.1 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

102. This database now covers all Commonwealth Law Reports from volume 1 to volume 212.

High Court Citations of United States Authority 1991-2002

Reporter	Citations 1991-2000	Citations 2001-2002
United States (U.S.)	1293	424
L. Ed., S. Ct., U.S.L.W.	46	2
Federal (F.)	337	142
Federal Supplement (F. Supp.)	60	94
Atlantic (A.)	69	11
North Eastern (N.E.)	105	39
North Western (N.W.)	30	12
Pacific (P.)	88	25
Southern (So.)	13	10
South Eastern (S.E.)	38	13
South Western (S.W.)	32	9
Total	2111	620

No analysis was undertaken to draw any statistical relationships or conclusions about the reporter series in which the United States cases appear.¹⁰³ Outside the purview of this updated study is the question of why certain regions of the United States appear more frequently than others. While the identification of particular courts or state systems as influential has been the subject of study in the United States,¹⁰⁴ an intuitive explanation would be that the location of major United States financial, commercial and cultural centers is reflected in the vibrant legal culture which developed to serve those centers.

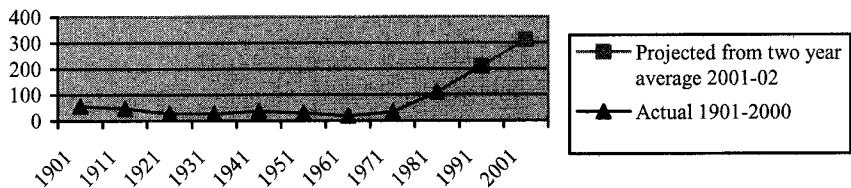
The above observations confirm that the use of United States authority by the High Court of Australia has continued unabated since the original study occurred, and at an increasingly frequent rate even by comparison to the 1980s. The period 1991-2000 saw approximately 211.1 citations per year. The two year period 2001-2002, though a smaller sample, presented

103. Considering the United States judicial framework, it would be far more likely that United States Supreme Court citations would predominate in constitutional and public law issues, with State decisions predominating in common law analysis. The study findings, though not presented, are consistent with that view.

104. Studies have been undertaken in the United States about the influence of the various state supreme courts within that country. *See generally* Friedman et al., *supra* note 18. One might assume that a court's influence on international jurists would be attributable to similar reasons as those found within the United States itself.

an average rate of citations of nearly 310 per year. By contrast, similar total citations in the period 1981-1990 showed an average of 109.6 citations per year.¹⁰⁵ Even this figure was nearly double that of the 56.5 citations per year in next highest decade in the original study (1901-1910).

Graph 6
Annual American Citations by High Court, 1901-2002



The observation of the types of cases in which precedent from the United States was used was also considered. In the most recent study, the findings of citations by topic area were as follows:

Citation by Topics
1991-2002

Period	Total Cites	Con	Pub	Com	Tort	Crim	CL	SL	Misc
1991-2000	2111	745	125	125	333	221	152	257	153
Percentage		35.3	5.9	5.9	15.8	10.5	7.2	12.2	7.2
2001-2002	620	109	22	75	145	19	42	165	46
Percentage		17.6	3.5	12.1	22.9	3.1	6.8	22.6	7.4

In the original study, the citation of United States authority varied from decade to decade as indicated in the following table (supplemented with the findings from 1991-2000 and 2001-2002):

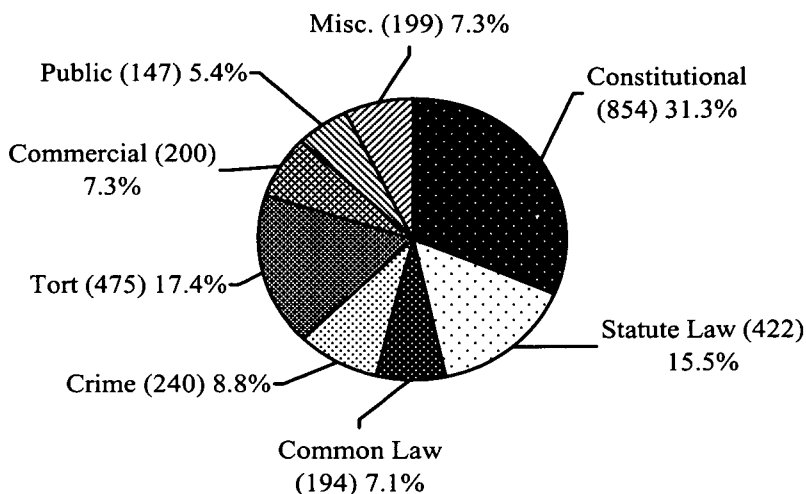
105. Even when supplemented by the study in 2002, this average remained quite constant, with the actual average citations per year for the period 1981-1990 being 109.6 citations per year rather than the 111 estimated at the time of the original study. *See supra* note 56.

Table of Topics
Decades 1901-1990, Supplemented By 1991-2002

Decade	Total Cites	Con	Pub	Com	Tort	Crim	CL	SL	Misc
1901-1910	565	71.5%	8.1%	4.1%	1.2%	1.6%	4.0%	8.3%	1.2%
1911-1920	474	71.9	9.7	2.3	4.6	0.5	6.3	3.4	1.3
1921-1930	273	74.4	2.2	7.7	2.9	0.0	10.3	1.8	0.7
1931-1940	269	48.3	2.6	6.0	13.4	2.6	8.2	16.7	2.2
1941-1950	366	77.6	7.9	1.6	0.0	1.9	4.4	3.0	3.6
1951-1960	296	64.2	7.5	1.3	14.2	1.0	10.5	1.0	0.3
1961-1970	190	50.0	7.4	3.2	19.4	4.2	7.4	8.4	0.0
1971-1980	329	27.9	15.8	3.6	3.0	9.1	27.3	5.2	7.9
1981-1990	1096	33.7	10.7	3.4	2.8	12.2	34.9	5.1	0.3
Total 1901-1990	3,858	54.7	8.8	3.5	5.0	5.2	15.6	5.5	1.7
1991-2000	2111	35.3	5.9	5.9	15.8	10.5	7.2	12.2	7.2
2001-2002	620	17.6	3.5	12.1	22.9	3.1	6.8	22.6	7.4
Total 1901-2002	6,589	45.0	7.4	5.1	10.1	6.7	12.1	9.6	4.0

The updated study indicated that the use of United States authority by the High Court was more consistent with the practice revealed in the 1981-1990 period than with any other period, with the proportion of constitutional cases continuing to decrease in a manner consistent with the original study.

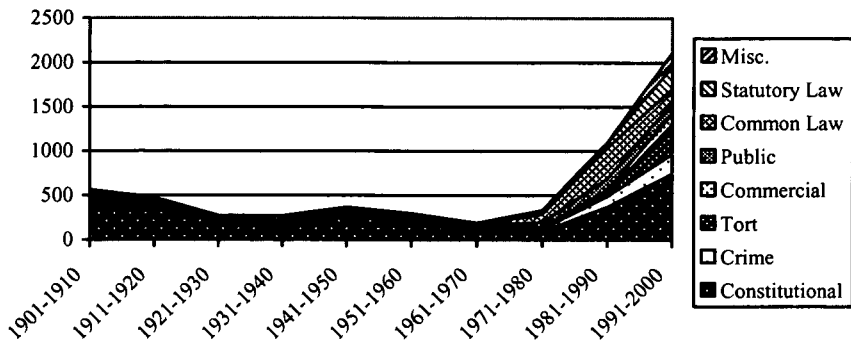
Graph 7
Topics of American Citations by High Court 1991 - 2002



As a corollary of the reduction in constitutional cases, the number of common law and statutory law cases in which United States authority has been used has continued to increase (although the proportions among the various categories thereof show few discernable trends).¹⁰⁶ The following chart indicates both the change of mix and the increase in frequency of use of United States citations (2001-2002 are not included).

106. The primary increase during this last period is in the area of miscellaneous. This is largely attributable to the inclusion of the numerous native title cases within this area.

Graph 8
American Citations by High Court, 1901-2000



VIII. CONCLUSIONS IN 2002: MODIFICATIONS TO THE ORIGINAL OBSERVATIONS

The empirical study performed through 1990 and the study undertaken this year confirm that the High Court has continued to consider authority from the United States in an increasingly broad range of topic areas since 1975. Of particular interest in the context of common law systems is the consideration of United States authority by the High Court in the areas of judicially-made law (common law) such as contracts and torts, where foreign innovations have not received the imprimatur of legislative action in Australia. Additionally, increasing use of authority from the United States can be seen in those areas of the law which relate to human rights and international obligations.¹⁰⁷

Commentators from Australia and abroad attribute this increase in Australia and in equivalent common law nations as arising from two distinct, yet inter-related developments: the elimination of appeals to the Privy Council¹⁰⁸ and the relaxation by the ultimate court of appeal in most common law countries (in equivalent positions to the High Court of Australia) of the requirement to adhere strictly to their own previous authority.¹⁰⁹ Both of these developments have encouraged broader perspectives in the development of national law.

107. See, e.g., *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501.

108. See discussion *supra* note 38 and accompanying text.

109. See discussion *supra* notes 30-39 and accompanying text.

The revisited study also provides two interesting, yet related specific observations which indicate that the High Court's judicial attitudes have changed, perhaps as a result of the above-mentioned structural changes. The first observation is that there is a continued use of United States authority in constitutional cases considered by the High Court of Australia.¹¹⁰ Many of the United States cases considered in constitutional law during the last decade, however, relate to implied rights found within the Australian Constitution.¹¹¹ The acceptance of such rights by implication has meant that much American constitutional jurisprudence is now relevant to Australia in a way which may not have been anticipated only ten years ago. A second specific observation, mentioned above, is that United States authority in relation to newly developing subject areas, such as native title¹¹² and immigration law,¹¹³ has proved to be quite useful to the High Court.

One might be tempted to assert that the High Court's use of United States authority is best explained by the fact that in such developing areas of law there is little or no established Australian or British jurisprudence. An alternative, equally plausible explanation is one that comparative law might provide: that as globally common issues arise, consideration of the broadest range of potential solutions and approaches to these common problems is not only permissible, but advisable.

The empirical citation analysis from the updated study confirms that the use of United States authority by the High Court of Australia continues to increase. This observation, taken alone, does not fully establish whether this is attributable to an acceptance of comparative law or of international perspectives by the High Court of Australia. The empirical evidence is consistent with the conclusion that the High Court now accepts the value of a global perspective, and that this sustains the increased use of United States authority. Nevertheless, the empirical evidence can only provide one element in the establishment of the benefit of comparative law in the development of Australian jurisprudence.

The use of foreign law as a tool to aid in the development of local law is becoming more common throughout the world, and the methods by which national courts use foreign authority has been the subject of numerous studies.¹¹⁴ While reference to foreign law has proceeded apace in many

110. See discussion *supra* Part VII.

111. See, e.g., *Australian Capital Territory Television Pty. Ltd. v. Commonwealth* (1992) 177 C.L.R. 106; *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104; *Lange v. Australian Broad. Corp.* (1997) 189 C.L.R. 520; *Levy v. Victoria* (1997) 189 C.L.R. 579; *Roberts v. Bass*, (2002) 212 C.L.R. 1.

112. *Mabo v. Queensland* (1992) 175 C.L.R. 1; *Fejo v. N. Territory* (1998) 156 A.L.R. 721; *Yanner v. Eaton* (1999) 201 C.L.R. 351; *Commonwealth v. Yarmirr* (2001) 208 C.L.R. 1.

113. E.g., *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273.

114. See, e.g., *THE USE OF COMPARATIVE LAW BY COURTS* 25-333 (Ulrich Drobing & Sjef Van Erp eds., 1999) (containing a collection of national reports).

countries, the methodology by which such foreign law is judged as appropriate for local use has remained relatively undeveloped: "most courts which refer to foreign law, be it statutes, court decisions or writings, do not really undertake a comparison of law, utilizing the methods and standards applied by academics."¹¹⁵

Because judges are concerned with resolving specific disputes, it is understandable that the High Court of Australia has not developed a systematic and complete comparative methodology to determine whether a legal solution arrived at in another country should be attempted in Australia. Throughout the period of this most recent empirical study, the High Court of Australia has shown a continued willingness to consider foreign law for possible solutions to be applied in Australia.¹¹⁶ Many would accept that it might be inappropriate for a High Court Justice to opine judicially about the methodology employed when considering the usefulness of foreign law; however, the academic and professional publications of particular High Court Justices provide insight into the manner in which such foreign law is used.

In the development of the methodology by which it considers foreign law, the High Court of Australia has exhibited a great willingness and an increasingly sophisticated ability to subject established authority to the test of foreign alternatives. As stated by Justice Michael Kirby, one of the greatest adherents of the acceptance of global perspectives on the High Court:

Increasingly a court such as the High Court of Australia looks beyond its traditional sources when solving a problem. Its traditional source was the law of England, and maybe it would look to Canada and the United States. But now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa. Mainly English-speaking countries because they tend to be common law countries and they tend to write their decisions in the English language. But, where relevant, we will look beyond that. It's a wise reminder for all of us that the best thoughts, the most creative thoughts, will come from outside of your magic circle. It's therefore important to stimulate your mind with analogous reasoning.¹¹⁷

115. Ulrich Drobnig, *The Use of Comparative Law by Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS* 4 (Ulrich Drobnig & Sjef Van Erp eds., 1999).

116. See discussion *supra* Part VI.

117. Justice Michael Kirby, Dialogue, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001).

Undoubtedly, the development of Australian law will continue to benefit from the willingness to consider broader perspectives and foreign solutions. The High Court's attempts to develop a full comparative methodology to judge the appropriateness of international solutions that it might employ should be welcome. For the benefit of Australian law, it is hoped that such methodological development will become more comprehensive and more commonly applied in the future. Only then will the full value of broadened international perspectives be achieved. Undoubtedly, the same arguments may be made in relation to the United States as well.